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In The

Supreme Court of the United States

71-10

NUMBER _____

LEONARD COLEY, PAUL D. SCOGIN
Petitioners

Vs.

THE UNITED STATES OF AMERICA
Defendant

PETITION FOR WRIT OF CERTIORARI

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COMES NOW, the Petitioners in the above matter and showeth that:

1.

In case Number 30139, summary calendar, United States Court of Appeals for the Fifth Circuit, said court found against your Petitioners and affirmed their conviction and sentence of 3 years in prison. The copy of said decision is attached hereto as Exhibit 1.

2.

The jurisdiction is invoked under Rule 19 of the Rules of the Supreme Court, and on the ground that the United States Cour of Appeals for the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of ths Court.

3.

The date of the judgement sought to be reviewed was April 30, 1971.

4.

The date of the order denying the Petitioners' petition for rehearing was June 1, 1971.

5.

Jurisdiction is conferred upon this Court by the Provisions of 28 U.S.C.A. Section 1254 (1), Rule 19 of the Supreme Court Rules, and the Fourth Amendment of the United States Constitution.

6.,

The question presented for review is as follows:

Did the Trial Court err in admitting into evidence, over the objection Petitioner Coley, Defendant in the trial, a tape recording of a telephone conversation between Petitioner Coley and a government informer who had consented to the recording when petitioner had neither consented to, nor was aware that, his words were being heard and recorded by a silent third party to the conversation?

7.

Petitioner contends that the admission of this evidence violated the Fourth Amendment to the United States Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searchers and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Petitioners' along with others, were indicted in the United States District Court of the Middle District of Georga, for conspiracy to defraud the United States, in violation of 18 U.S.C.A. Section 371 by possessing, transfering, and selling distilled spirits on which a tax had not been paid, and for three counts of possessing or transporting whisky on which tax had not been paid, in violation of 26 U.S.C.A. Section 6205 (a) (2) and 5064 (a). Petitioner pled not guilty. A trial was had and the petitioner Coley was convicted of conspiracy, but acquited on the other counts of possessing and transporting non-tax paid whiskey. Petitioner Coley was sentenced to three years in the federal penitentiary. Petitioner Scogin was sentenced to eighteen months.

Among the evidence introduced in the trial, over objection by Petitioners were tape recordings of telephone conversations between Petitioner and a government informer. T-149. These recordings were made in the office of the Alcohol, Tobacco, and Firearms Unit in Athens, Georgia, by placing a suction-type receiver on the telephone, with the consent of the government agent. The government agent then called and spoke to a party identified as Petitioner Coley. T-136-137. At the trial, the government agent testified as to the substance of the telephone conversations with the Petitioner Coley. T 37-44.

Review of the judgment of a federal court is sought, and federal jurisdiction in the trial court is based upon the allegation that Petitioner violated a statute of the United States.

9.

The reasons upon which the Petitioners rely for the allowance of the Writ of Certiorari are as follows:

THE TAPE RECORDING OF PETITIONER'S TELEPHONE CONVERSATION WITHOUT HIS KNOWLEDGE OR CON SETT WAS AN UNREASONABLE SEARCH AND SEIZURE, AND WAS THUS PROHIBITED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THUS, THE DISRICT COURT ERRED IN ADMITTING THESE TAPE RECORDINGS INTO EVIDENCE.

This Court has previously held that wiretaps are searches and seizures within the ambit of the Fourth Amendment. **Katz v. United States,** 389 U.S. 347 (1967); **Berger v. New York,** 388 U.S. 41 (1967).

Thus, since words may be the objects of a search and seizure, under the Fourth Amendment, the search or seizure must meet the standards of that amendment, or must fail for illegality. Since admittedly no warrant was obtained in the instant case, the recording of Petitioners' conversations should have met the standard of reasonableness.

In earlier cases, the determination of the issue of reasonableness has been resolved by a balancing test, weighing the interest of a private citizen which has been infringed against the utility to the government resulting from the infringement.

Petitioners contend that the Government can show no compelling interest to justify these invasions of privacy. For although the Fourth Amendment is literally directed toward the protection of tangible items, i. e., persons, papers, or effects, in its effect it serves as a protection of the privacy of American citizens. The Framers of the Constitution must not have been as concerned with the rights of citizens to possess blank pieces of paper as they were with protecting from search and seizure the sentiments expressed upon those slips of paper. Thus viewed, the Fourth Amendment is clearly one part of an integral whole composed of the entire Bill of Rights. By proscribing unauthorized intrusions into the privacy of all citizens, the Fourth Amendment closely meshes with the First Amendment. Freedom of expression is as likely infringed by unauthorized searches or seizures (exposure to governmental scrutiny) as by a direct pro hibition of expression.

Similarly, the knowledge that one's conversations may be constantly monitored by government agents, without either a showing of probable cause of exigent government circumstances, serves as effective a limitation on free speech as a direct prohibitive. In fact, should some types of speech ever be prohibited, such a statute will be enforced by devices like those found in the instant case.

What interest can the government oppose to Petitioners' right for truly free conversation, conversation which is free not only from direct restraint but also from the subtle deterent posed by constant surveillance? No danger was posed to the government agent, there was no opportunity for the destruction of evidence, and there was no possibility that a suspect would escape in the time required to obtain a warrant. Absent such exigent circumstances as these, which would not ony excuse the absence of a warrant but would also bear on the issue of the reasonableness of the intrusion, the warrantless recording was an unreasonable search a seizure in violation of the Fourth Amendment.

The judgement of the 5th Circuit Court of Appeals, the verdict of the jury and judgement of the Athens Division of the United States Court of the Middle District of Georgia should be reversed.

This 29th day of June, 1971.

Southern Mutual Bldg.
Athens, Georgia 30601

Jim Hudson
Attorney for Petitioners

I Certify that I have this day served a copy of this petition upon the United States of America as prescribed by law and hereby enter my appearance as Attorney of record for the petitioners.

This 29th day of June, 1971.

Jim Hudson
Athens, Georgia

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30139

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LENNARD COLEY and PAUL DABNEY SCOGIN,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Georgia

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(April 30, 1971)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

DYER, Circuit Judge: After indictment and trial, Coley was convicted of conspiracy to possess, transport, and sell non-taxpaid whiskey in violation of 18 U.S.C.A. §§ 371. Scogin was convicted of possessing

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*Rule 18, 5 Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

and transporting non-taxpaid whiskey in violation of 26 U.S.C.A. §§ 5205(a) (2), 5604(a). Coley and Scogin advance two arguments on appeal: First, that the District Court erroneously admitted a tape recording of a telephone conversation between Coley and a government informer, who had consented to the recording; second, that the District Court erroneously denied Coley's motion to quash the indictment. We affirm.

Included in the evidence introduced at the trial were tape recordings of telephone conversations between Coley and a government informer. With the informer's consent, government agents placed a suction-type receiver on a telephone used by the informer to call Coley. When the informer reached a party identified as Coley, government agents used a tape recorder in conjunction with the special receiver to record their conversation. During the trial the informer testified to the substance of his conversation with Coley; the Government introduced the tape as evidence to corroborate this testimony.

Relying on *Katz v. United States*, 1967, 389 U.S. 347, appellants argue that the recordings violated their fourth amendment rights and thus comprised inadmissible evidence. Initially it is clear that Scogin has no standing to pursue this argument. There is no evidence that he was a party to the conversations between Coley and the informer or that he owned, possessed, or controlled the premises or the telephones used during these conversations. *See Alderman v. United States*, 1969, 394 U.S. 165, 171-80.

With respect to Coley, it is equally clear that the

tape recordings were not the fruit of an unconstitutional search and seizure. In several post-*Katz* decisions, this Court has held that governmental action such as that challenged here remains constitutionally permissible. *E.g., Koran v. United States,* 5 Cir. 1969, 408 F.2d 1321, 1323-24; *Harris v. United States,* 5 Cir. 1968, 400 F.2d 264, 267; *Velez v. United States,* 5 Cir. 1968, 397 F.2d 788, 789; *Dryden v. United States,* 5 Cir. 1968, 391 F.2d 214, 215. The Supreme Court's discussion of the issue in *United States v. White,* 1971 ____ U.S. ____, ____, certainly buttresses the position taken by this Circuit. Indeed, the *White* Court explicitly noted that "we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question." *Id.* at ____.

Appellants' alternative ground for reversal is based on the District Judge's denial of Coley's motion to quash the indictment. During a preliminary hearing prior to indictment, a government witness refused to answer questions propounded by Coley's counsel. Though advised by the United States Commissioner that he must reply or risk dismissal of the case, the witness continued to refuse. The commissioner then dismissed the charges against Coley. Subsequently, however, a grand jury indicted Coley for the same offense. Appellants urge that Coley had a substantial right to cross-examine witnesses at the preliminary hearing and that the commissioner's failure to enforce this right denied him due process. Specifically they aver that termination of the hearing deprived them of the right to utilize it for pre-trial discovery.

Once again, Scogin has no standing to argue this point or to benefit from its resolution. The alleged deprivation of rights was personal to Coley.

Coley's argument must fall on its premise, that a preliminary hearing to afford pre-trial discovery is constitutionally mandated. First, the primary function of a preliminary hearing is not to expedite discovery. The purpose of such a hearing is to ascertain whether or not there is probable cause to warrant detention of the accused pending a grand jury hearing. *United States v. Brown*, S.D. Ga. 1969, 305 F. Supp. 299, 304; *see* 18 U.S.C.A. § 3060(a); Fed. R. Crim. P. 5(c). While some manifestation of the quantum of a prosecutor's evidence is necessary for a qualitative evaluation of probable cause, such discovery remains incidental to the true purpose of the proceeding. *See United States v. Bates*, E.D. Tenn. 1968, 287 F. Supp. 657, 660. Indeed, as District Judge Wilson has ably commented:

> The primary function of the preliminary hearing should remain the determination of probable cause and not discovery. It is not well suited for discovery and any attempt to subvert it to this purpose might well cause it to be more frequently by-passed in favor of going directly to the grand jury. See Moore Federal Practice and Procedure, §5.04(3). Any broadening of the defendant's rights to discovery in criminal cases should more properly be left to the provisions of Rule 16, Federal Rules of Criminal Procedure, which deals specifically with this problem.

Id. See also 1 C. Wright, *Federal Practice and Procedure*, § 80, at 136-40. As Coley has admitted, his counsel attempted to utilize the preliminary hearing for discovery. Consequently the prosecutor aborted the hearing and submitted his case to the grand jury. This Court has held that submission of an accused's case directly to a grand jury, even absent a preliminary examination, is not constitutionally impermissible. *Woods v. Texas*, 5 Cir. 1968, 404 F.2d 332. Coley's argument does not impel us to reverse our position.

Second, the Constitution does not require preliminary hearings. Failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate a subsequent conviction. *Scarborough v. Dutton*, 5 Cir. 1968, 393 F.2d 6; *see Woods v. Texas*, *supra*. This is not to say that preliminary hearings are not favored in the federal system. Certainly an accused may gain his unconditional release from custody if a preliminary examination is not held within the time specified by 18 U.S.C.A. §§ 3060(b), (c). However, his discharge does not prevent, or prejudice, later institution of criminal proceedings based upon the charge which prompted his arrest. 18 U.S.C.A. §§ 3060(d). Furthermore, an accused is not entitled to unconditional release if an indictment is returned prior to the date set for a preliminary hearing. 18 U.S.C.A. § 3060(e).

In the instant case, the distinction between an aborted preliminary hearing and no hearing is one without a difference. Coley claims merely that termination of the hearing hampered discovery of the Government's evidence. He has not alleged that he remained in cus-

tody after the hearing. If he had offered such an allegation, this would be neither the time nor the place to consider it. Thus, it is impossible to ascertain that he has suffered any harm, or to perceive what harm he could have suffered.

AFFIRMED.

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